

SPECIAL NOTICE CONCERNING SBX2-9 AND THE FUTURE OF LABOR COMPLIANCE PROGRAMS

On February 20, 2009, Governor Schwarzenegger signed into law Senate Bill 9 (SBX2-9), which was one of the measures adopted in the legislature's second extraordinary session to address California's budget crisis. SBX2-9 should provide substantial cost savings to government agencies engaged in public works construction projects, while at the same time improving prevailing wage enforcement on those projects. SBX2-9 amended several laws that currently require cities, counties, school districts, transit districts, and other government entities to operate a labor compliance program ("LCP") or to contract with a third party LCP to enforce prevailing wage requirements on specified bond-funded or design-build public works projects.* Under the new law, these entities will pay a fee to the Department of Industrial Relations for enhanced labor compliance monitoring and enforcement in lieu of maintaining an LCP.

Background: California has regulated employment on public works projects for over a century and traditionally has relied on DIR's Division of Labor Standards Enforcement (aka Labor Commissioner) to enforce these laws. In 1989, the Labor Code was amended to allow other government agencies to use DIR-approved LCPs to enforce state prevailing wage requirements on their own projects. More recently, legislation began *requiring* school districts and other agencies to use LCPs for specified projects. The attachment of this requirement to projects funded by the 2002 and 2004 school construction bonds resulted in a dramatic increase in the number of LCPs from fewer than a dozen at the end of 2002 to nearly 400 a year later.

A 2007 report by the Legislative Analyst's Office concluded that LCPs were both costly and ineffective in terms of their reported recoveries of back wages and penalties. After concluding that mandated LCPs was a "failed enforcement scheme," the Governor looked for alternatives to ensure full protection for workers on public works projects and maintain a level playing field for all public works contractors. SBX2-9 provides such an alternative by taking enforcement responsibility out of the hands of school districts and other agencies, while at the same time providing dedicated funding to DIR for enhanced monitoring and enforcement, at an overall cost savings to the agencies and taxpayers.

What SBX2-9 does: SBX2-9 amends various sections of the Education, Government, Labor, and Public Contract Codes that require government agencies engaged in public works projects (also referred to as "awarding bodies") to initiate and enforce their own LCP or to contract with a third party to initiate and enforce an LCP. Some of these statutes require LCPs for projects funded in whole or part from specified voter-approved bonds. The other statutes require LCPs for certain projects using design-build or other specified contracting authority, but also permit awarding bodies to avoid the LCP requirement by entering into project labor agreements.** Under SBX2-

* SBX2-9 also made one definitional change in public works law pertaining to capital improvements to charter city water, sewer, and storm drain systems. This notice is concerned only with the provisions of SBX2-9 that pertain to labor compliance programs and enforcement. The text of SBX2-9 is available at http://info.sen.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx2_9_bill_20090220_chaptered.pdf.

** A list of statutes that currently require awarding bodies to use an approved LCP can be downloaded at <http://www.dir.ca.gov/lcp/StatutesRequiringLCPs.pdf>.

9, the awarding bodies that were subject to these requirements will instead pay the DIR a fee to be used for the enforcement of prevailing wage requirements on the covered projects. In addition to the laws that currently require LCPs for specified projects, this fee requirement will also apply to all projects funded by any other bond issued by the state for public works construction, including, for example, the High Speed Rail measure [Proposition 1A] that was adopted in the November 2008 election. Awarding bodies with their own approved LCPs that wish to continue doing their own labor compliance monitoring and enforcement, may be eligible have this fee waived. However, the fee waiver will *not* be available to awarding bodies that contract their LCP responsibilities out to third party programs. Also, there will no longer be an exception to these requirements for awarding bodies that enter into project labor agreements.

Effective Date: SBX2-9 requires DIR to do two things before it begins collecting a fee and providing enhanced monitoring and enforcement on bond-funded and other specified types of projects. DIR must determine the amount of the fee that will be assessed for this work, subject to the limitations noted below. DIR must also to adopt regulations setting forth its monitoring and enforcement responsibilities under the new fee-supported system. Currently, we anticipate that we will complete these two necessary steps by the beginning of 2010, and we intend to give plenty of advance warning of the effective date for the new system.

The requirements of SBX2-9 to pay a fee to DIR in lieu of maintaining an LCP *will only apply to public works contracts awarded after the new fee and regulatory structure have been adopted.* Contracts awarded prior to that date will be subject to current LCP requirements and the project labor agreement exception, if applicable, for the life of those contracts.

Fees Paid to DIR for Prevailing Wage Enforcement: SBX2-9 requires DIR to determine and from time to time adjust the fee to be charged for administering prevailing wage requirements on projects subject to the fee. The fee must be approved by the Director of Finance, and in the case of bond-funded projects, is limited to “one-fourth of one percent of the bond proceeds.” The fee will be deposited into a special fund known as the “State Public Works Enforcement Fund,” and may only be used for enforcement of prevailing wages on the covered projects.

Right now we are studying the extent and cost of monitoring and enforcement services that DIR might provide under SBX2-9. The statute expressly requires DIR to review certified payroll records on a monthly basis (as is currently required of LCPs) while leaving it to DIR to determine what additional services will be provided within the general framework of the monitoring and enforcement performance standards that now govern LCPs. The maximum fee of one-quarter of one percent of bond proceeds is substantially less than what school districts currently are authorized to spend for LCP services for bond-funded construction (per the State Allocation Board’s regulations at 2 Cal.Code Reg. sections 1859.71.4 and 1859.78.1).

Fee Waivers: SBX2-9 provides that DIR may waive the fee “for an awarding body that previously has been granted approval by the director to initiate and operate a[n] [LCP] on the awarding body’s projects,” and wants to continue doing so in lieu of paying for DIR monitoring and enforcement. However, SBX2-9 does not allow the fee to be waived for an awarding body that contracts out its LCP responsibilities to a third party program. At the present time, we have

not determined what fee that will be charged for DIR monitoring and enforcement, nor have we established any procedure or standards for waiving this fee. While we understand that some agencies are anxious to know what rights and responsibilities they will have once the new system goes into effect, *any request for a fee waiver at this time is premature and will not be acted on.*

DIR's Monitoring and Enforcement Responsibilities under SBX2-9: For all projects subject to the new fee, DIR will be required to (1) review payroll records on a monthly basis, and if appropriate, audit those records to verify compliance with state prevailing wage laws; and (2) undertake additional tasks, *as determined by regulation*, to monitor and enforce compliance with prevailing wage requirements. SBX2-9 leaves it to DIR to adopt reasonable regulations that set forth the specific tasks to be undertaken, with consideration given to the duties now performed by LCPs under 8 Cal.Code Reg. sections 16421 – 16439.

As with the fee and fee waiver standards and past amendments to the LCP regulations, DIR will fully involve affected and interested parties in the process of adopting these new regulations. As noted above, DIR currently is studying the extent and cost of monitoring and enforcement services that might be provided under the new system. This study may include one or two “pilot” projects to assess the cost, effectiveness, and logistical issues associated with particular types or levels of service. We will also look at the costs and logistics for other LCPs that have been performing the same types of duties on a large scale basis.

Future of Third Party LCPs: Once SBX2-9 becomes effective, most statutes that currently require awarding bodies to use LCPs for specified construction projects will instead require those agencies to pay DIR a fee for labor compliance monitoring and enforcement. This change will also do away with the option of contracting out LCP responsibilities to approved third party programs. Moreover, awarding bodies that want to continue using an LCP will not be eligible for a fee waiver from DIR if they contract out their LCP responsibilities to a third party program.

From a practical standpoint, this means that bond funds will no longer be available to pay for the use of a third party LCP. This in turn may eliminate the need for DIR to separately approve and regulate third party programs. However, it will not result in the elimination of those programs.

As noted above, the new system for fee-supported monitoring and enforcement by DIR will only apply to public works contracts awarded after the new system is in place. Existing LCP requirements, along with the option to contract out those responsibilities to an approved third party program, will remain in effect for the life of any public works contract awarded before the effective date of the new system. For major projects awarded through the balance of 2009, this “tail period” could extend for several more years into the future.

Even after existing LCP requirements expire, third party programs will not be precluded from providing labor monitoring and compliance services that do not involve the exercise of enforcement authority under the state's public works laws.

Questions concerning the Implementation of SBX2-9: If you have questions about SBX2-9 that are not adequately addressed by this memo, please present them *in writing* either by e-mail to tgormley@dir.ca.gov or by regular mail to: DIR, Office of the Director, Attn.: Tess Gormley,

Special Assistant to the Director, 455 Golden Gate Avenue, 10th Floor, San Francisco, CA 94102. For the sake of clarity and accuracy, we prefer not receiving or trying to respond to these inquiries by inquiries.

To receive notice of any proposed regulations on fees, fee waivers, or DIR monitoring and enforcement responsibilities under SBX2-9: Please send a written request that includes your contact information either to LCPCComments@dir.ca.gov or to tgormley@dir.ca.gov.

Questions concerning SBX2-9's new coverage exception for charter city water, sewer, and storm drain systems: Please contact the Division of Labor Statistics & Research at 415-703-4780.